coming generation of men and women against the maleficent influences of war, upon children. The Bureau of Naturalization has made American citizens of thousands upon thousands of alien soldiers in the American armies in France as well as in the United States. The Secretary himself has laid the foundations for making the returning soldiers realize that the country they have fought for is measurably at least their own. And last, though by no means of least importance, the Mediation Service has amicably adjusted approximately 3,200 labor disputes, with satisfaction to all concerned, out of a total of about 3,800 entrusted to it during the war by the disputing parties.

The work of the Department of Labor as a whole is written at large in the sixth annual report of the Secretary of Labor, which brings the story down to the last days of the war.

THE LEGAL AND CONSTITUTIONAL ASPECTS OF THE PROPOSED PROHIBITION AMENDMENT TO THE FEDERAL CONSTITUTION

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THE proposed prohibition amendment is, outside of the merits of such a policy as a moral measure, so full of suggestions and questions that it becomes a citizen's duty to study its legal and constitutional aspects, its character and the results, if adopted, upon the system of our republican form of government; also the method of its submission by Congress to the states for ratification and the effect of the language wherein concurrent power to legislate is given to the federal and state governments.

The amendment reads as follows:

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

I

The fundamental objection to the amendment is that it proposes to put into the Constitution a matter of police regulation when that document ought to be, and so far has been, limited to a statement of the basic principles of a representative government. The Constitution deals only with such matters and as a great charter of rights and powers conferred by sovereign states upon a government, which forms a union of them all, more powerful than any one or indeed than all regarded separately, yet still their creature and serving each state, it has risen to a height never before attained by such an instrument.

The secret which pervades its majestic simplicity is that it has to do only with those subjects which lie at the root of government. All others are left to the local communities, the states, to decide. The immense territory covered by the nation, with its varying climates and the differing temperaments of its people—in fact, its myriad of local conditions, render it best that all matters not necessary for the union should be left in the control of the states.

A principle, no matter how good it may be, has no place in the Constitution of the United States if it does not fall within that class of matters with which the Constitution was intended to deal. If we should undertake to put a statement of everything that is regarded as good by the different peoples of our forty-eight states, we should soon find the Constitution stretched to and beyond its limit, subject to frequent change and regarded with contempt by a large number of good citizens. It is a matter of common knowledge that many statute laws are so regarded now. But those statute laws can be easily changed whenever public opinion in the several states, or in the United States, so desires, but when once those matters, which ought to be the subject of laws either statewise or national, become a part of the federal Constitution, they are elevated to a dignity which they do not deserve and they consequently lower the respect with which that document is held. This is indeed a most serious menace to our form of republican government. If we can put into our national Constitution a matter relating to police regulation, such as this proposed prohibition amendment is, no matter how wise it may be as a police measure, then others can be also inserted relating to other individual conduct, etc. The Constitution will thus be dealing with particulars of individual action, not related at all to the fundaments of a republic.

Personal matters should be left to local authorities, or if

they are to go to the national government they should go as being subject to the laws of Congress rather than be put into the Constitution where they can only be changed by the slow and tedious method rightly provided by the Constitution for its amendment.

One of the principles upon which our form of government was founded was that personal liberty should be preserved so far as possible. To make absolute in the Constitution a principle relating to one subject invites making absolute other principles and thus the Constitution becomes an instrument of absolutism and defeats the very purpose for which it was established.

The liquor question would not be settled by adopting this proposed amendment to the federal Constitution. The laws in regard to it, if adopted, would be enforced in different degrees in the several states and the subject would be a never-ending force in both state and national elections. What amount of alcohol would make a liquor "intoxicating" and what constitutes "beverage purposes" would furnish large room for debate and inconsistent legislative action, which each state has the power under the proposed amendment to make.

It is well known that many of the advocates of this measure in the different states have been for years building up their political fences by endeavoring to pander to the prohibition vote without any regard to the effect upon our government. It would not much avail the *bona fide* prohibitionist to have prohibition at the expense of the republic, especially as he can have his desideratum otherwise without any injury to our form of government.

The Constitution should be limited to fundamental principles of government and should not contain police matters relating to personal conduct. If we begin with putting prohibition regulations in the Constitution we shall find other subjects, also not relating to the basic rules of a republic, crowded upon us for a place in that document. This course will bring the Constitution into disrepute and result in frequent changes and finally in its overthrow.

II

Another reason why the proposed prohibition amendment should not be ratified is that the amendment has never been passed on by the Senate and House of Representatives at Washington and submitted to the states in accordance with the provisions of the federal Constitution. The Constitution provides in article V. that "the Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to

this Constitution." Two thirds of both houses must concur in deeming it necessary. According to the certified statement of Mr. Trimble, the clerk of the National House of Representatives, there were 282 votes in favor of the proposed amendment, six less than two thirds of that house. In the Senate, according to a like statement of Mr. Baker, the secretary of the Senate, there were on the final vote only 47 in favor of the proposed amendment, 19 less than two thirds of the upper house, and not even a majority.

It is true that there have been rulings by speakers of the House and by presidents of the Senate to the effect that two thirds vote means two thirds of those present, or two thirds of a quorum. A quorum is a majority, that is, one half plus one. A quorum in the House would therefore be 217, two thirds of which is 145. A quorum in the Senate is 49, two thirds of which is 33. According to such rulings it would be possible for the National Congress to propose an amendment to the Constitution when 145 out of 432 members of the House and 33 out of 96 members of the Senate so voted. We believe that such is not the true intent and meaning of the Constitution. It was considered by the men who made that great bulwark of civil rights that it should not be easy to change it and they wisely provided that before an amendment could be submitted to the states for ratification it must be deemed necessary by two thirds of both houses. The Constitution does not say that the vote shall be by two thirds of a quorum or two thirds of the members present, as it would have done, we believe, if such had been the intention. When such a vote was sufficient it was so expressly stated, as in article I, section 3, which deals with the power of impeachment, where it is provided that "no persons shall be convicted without the concurrence of two thirds of the members present."

In article I., section 5, paragraph 1, it is declared that "each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business but a smaller number may adjourn from day to day," etc.

Paragraph 3 of same section: "Each house shall keep a journal . . . and the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the journal."

In article II., section 2, paragraph 2, it is provided that "He" (the president) "shall have power, by and with the advice and consent of the Senate, to make treaties provided two thirds of the Senators present concur."

This discriminating language gives confirmation to the con-

struction of article V. that two thirds of both houses means two thirds of the full membership, rather than two thirds of the members present.

The Constitution was framed by men of the highest ability and character with an experience and surroundings such as could hardly again be expected. They had lived as colonists of Great Britain, were familiar with the principles underlying that great system for the protection of civil rights and liberties known as the common law, had gone through eight years of the Revolution, had seen and known the actual workings of the Articles of Confederation, which had been agreed upon during the Revolutionary War. They had realized that new states would come into the union. The Northwestern Territory was the main, if not the only thing, which kept the union from falling to pieces in 1786. This had been conquered by George Rogers Clark, in 1779, and which the careful and judicious part taken by our commissioners at the time of the treaty in 1782 had enabled us to hold. Virginia had apparent possession of it, but claims were also made by New York, Massachusetts and Connecticut. Maryland demanded that this immense territory ought not to be added to any one state or divided among two or three states, but that it should be the common property of the Union. She refused to ratify the Articles of Confederation until the four states named should relinquish their claims to the Northwestern Territory, which was done between 1780 and 1786. This action of Maryland was for many reasons a great contribution to the ultimate security and growth of the union. Congress spent much time in providing for the organization of this territory, culminating in the Ordinance of 1787, which was the beginnings of the great states of Ohio, Indiana, Illinois, Michigan and Wisconsin. Many disrupting forces were at work to destroy the union of the states but the problems arising in reference to the new territory tended to hold the union together. The construction of the Chesapeake and Ohio and Erie canals was the result of deliberations had in those early days for means of communication between the original thirteen states and this new territory. Commercial policies were discussed and a general convention of the states to decide upon a uniform system of regulations for commerce was called and held at Annapolis in September, 1786. Only eleven states sent representatives and the convention adjourned without transacting any other business than calling another convention to meet at Philadelphia on the second Monday of May, 1787, "to devise such further provisions as shall appear necessary to render the Con-

stitution of the federal government adequate to the exigencies of the union."

The delegates to that convention were such men as Alexander Hamilton from New York, Robert Morris from Pennsylvania, George Washington and James Madison of Virginia, the Pinckneys from South Carolina, and Elbridge Gerry and Rufus King, of Massachusetts, and Oliver Ellsworth and Roger Sherman, of Connecticut. It has been stated by many eminent authorities that never again would it be possible to get together men of such intelligence, experience, training and sincerity in such an atmosphere as pervaded the deliberations of that convention. They had a clear vision of many new states. They knew the pitfalls in regard to the fundamentals of a republican form of government and the fact that the document, which they produced, has with slight changes stood the test for all these decades and now is regarded as a model for the world generally, is evidence of their great insight and wisdom.

After the instrument had been agreed upon, it was referred to a committee on style and it was written in the best and clearest of English. It is inconceivable that when it said "two thirds of both houses," one third only was intended; for 145, two thirds of a majority, or of a quorum, is substantially one third of 432, the total membership of the present National House of Representatives, and 33, two thirds of a quorum of the Senate, is one third of 96, the present membership of that body.

The atmosphere in which the Constitution was prepared should not be overlooked nor should it be forgotten that every article is founded on the presumption of a clashing of interests between the larger and the smaller states.

Notwithstanding any precedent which has been made in the House and Senate which allows so small a number of each house to be considered as two thirds, the states have never decided that such a construction of the Constitution was the proper one, although they have ratified amendments submitted by less than two thirds of both houses, about which there has been no disagreement and where the point was not raised before them. Failure to raise the question concerning an amendment in favor of which there was practically unanimity of opinion can not be held a waiver of the right to raise the objection nor an acquiescence in the precedent claimed to have been established. We believe that no state, deliberately and with its eyes open, would desire to put itself upon record as in favor of this method of changing the Constitution. If a sufficient number of states should ratify such a method of amendment the results would be

fraught with grave consequence. This would be only the entering wedge.

The language of Mr. Justice Davis, in *ex parte* Milligan, 4 Wallace 125, is apropos:

> This nation, as experience has proved, can not always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written Constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of habeas corpus.

Article V of the Constituion also requires that three fourths of the states shall ratify any proposed amendment. It does not say three fourths of those that vote, but three fourths of the states. A state may refuse to vote upon the subject and if one state can refuse to vote, then 23 of them may so refuse, and three fourths of the other 25 may ratify the so called action of Congress; thus 25, being a majority or quorum of the 48, the proposed amendment would be a part of the Constitution by the ratification of only 19 states, if this method of amendment should prevail.

Those in favor of standing by the so-called precedents made by the speakers of the National House of Representatives and by the presidents of the Senate hold that the word "houses" means a session of the houses, capable of doing ordinary business; that is a majority or a quorum present in each house. But this matter of amendments to the Constitution is not the ordinary business of the legislative branch of the government. In the case of Hollingsworth *vs.* Virginia, 3 Dallas, 378, the United States Supreme Court held that the President's signature to a resolution proposing amendments to the Constitution was not required. Attorney General Lee, in his address to the court, said that "the case of amendments is evidently a substantive act unconnected with the ordinary business of legislation and not within the policy or terms of investing the president with a qualified negative on the acts and resolutions of Con-

gress." He was about to continue further in his answer to the argument of counsel on the other side when he was interrupted by Mr. Justice Chase, who said, "There can surely be no necessity to answer that argument. The negative of the president applies only to the ordinary case of legislation; he has nothing to do with the proposition or adoption of amendments to the Constitution."

It is, therefore, evident that the framers of the Constitution considered the proposing of amendments an extraordinary power outside of the ordinary business of Congress. Any precedents made by the House and Senate in reference to overruling a veto of the president, where two thirds vote is required, are, we believe, not binding upon the states in their view with reference to this extraordinary exercise of constitutional power by Congress.

But this question, while partly legal and one which the courts can determine, has also a broader range and is one which in the immediate future is coming before our states for action. It has a political aspect, using that adjective in its best sense, and the responsibility should not be shirked by the Legislative Department and cast wholly upon the Judicial Department for decision. The state senators and representatives are sworn to support the Constitution of the United States as well as that of their own state and their sworn duty requires a rejection of any amendment which has not been submitted in accordance with that Constitution.

To show the lengths to which the speakers of the house have gone in defiance of the Constitution it might be stated that in February, 1902, the House was considering the joint resolution proposing an amendment to the Constitution in regard to the election of senators when Mr. Corliss, of Michigan, asked whether a roll call was necessary or would it be sufficient, if, in the judgment of the speaker, a two thirds vote was cast. The speaker answered that the presumption being that a quorum was present and the chair deciding that in his opinion there was a two thirds vote in favor of the measure, it was within the power of the House to test the vote but it was not necessary.

Thus if only ten members of either house were present and no want of a quorum was suggested, two thirds of the ten could pass a resolution submitting a constitutional amendment. Even when there is a quorum present, 145 members of the House and 33 members of the Senate would under such ruling be sufficient.

If 145 members of the House and 33 members of the Senate can propose an amendment to the Constitution and start it on its way for ratification by the states, that action permits 287

members or substantially two thirds of the lower house and 63 Senators, exactly two thirds of the Senate, to avoid the responsibility of deciding whether or not the amendment is necessary. It was the intention of the framers of the Constitution to require, and we believe the provision was a wise one, that the Senators and Representatives at Washington should take the responsibility of deciding, and that two thirds of them must agree that any proposed amendment to the Constitution is wise and necessary. The language of article V is mandatory and not merely permissive. Shifting of responsibility on so important a matter is full of evil consequences.

The states are interested in preserving the Constitution for their own protection and amendments ought to be jealously guarded.

The proposed prohibition amendment has never been properly passed by the National Senate and House of Representatives, and therefore it should not be ratified by the states.

III

Section 2 of the resolution proposing the prohibition amendment provides that "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

This provision is so clearly wrong that to make it a part of the Constitution would be a most unfortunate event. It would introduce an element of confusion in the enforcement of a great police power. No matter what views may be entertained by a person upon the subject of national prohibition, it is of the utmost importance that in respect to matters confided to the federal government that that government should have supreme power.

Constitutional authorities universally agree that the United States would never have risen to the dignity of a nation were it not for the provision that the Constitution and the laws of the United States made in accordance therewith and all treaties "shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the Constitution and law of any state to the contrary notwithstanding."

The prohibition amendment now under consideration specially confers upon the Congress and the several states concurrent power to enforce this article by appropriate legislation.

It has been held by good lawyers that the proposed amendment would extend the power of the several states over interstate and foreign commerce as it certainly extends the power

of the United States over the manufacture and consumption within the several states.

If the amendment were adopted, it would doubtless lead to grave conflicts between the federal government and the states and would give rise to antagonistic legislation between the states themselves and between the states and the United States. If it means, as it says, that "the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation," and as that necessarily implies that there must be concurrent action by all the states and the United States, all agreeing on the exact form of legislation, then it would be an absurdity, for it is too much to expect that all the states and the United States would exactly agree on subjects, about which the several states are in conflict and where there is so much diversity of opinion. The subjects under consideration would be what constitutes intoxicating liquors, that is, what percentage of alcohol makes a liquid intoxicating. The range of legislation would very probably be anywhere from a fraction of one per cent. to at least five per cent. of alcohol to make a liquid intoxicating. Another subject about which the Congress and the forty-eight states would not agree would be, what constitutes "beverage purposes." There may easily be forty-nine different laws on the subject and no person would know how he stood in respect thereto, for while acting entirely according to the laws of one state, he might be acting exactly contrary to the laws of other states, and perhaps contrary to the law of the United States.

Suppose the state of New York should pass a law that it was lawful to manufacture and sell all liquors containing less than three per cent. of alcohol and suppose Congress should pass a law which should make it unlawful to manufacture and sell any liquors that contained more than one half of one per cent. of alcohol. Which of these laws should prevail? There would be no concurrent action and both laws would fall to the ground.

For the first time in the history of the United States the ratification of this proposed prohibition amendment would introduce into the fundamental law of the United States a question of power, that is, of concurrent power between the states and the nation in regard to a matter committed to the national government. It is going back to the false principles of the state rights leaders of Calhoun's time and a revivification of the old idea of condominium, which are sure to always cause trouble.

It will be noticed that concurrent power to legislate, not concurrent jurisdiction, is given to Congress and the several states.

Concurrent jurisdiction with sole power in the federal government to legislate would have been proper so far as this third point is concerned, for there would then be only one law to be enforced in either the jurisdiction of the federal courts or of the state courts.

The states already have the power to prohibit the transportation and dealing and use of liquor within themselves and the United States Congress has passed an act prohibiting the transportation of liquor into any state or through any state, where that is prohibited by the state government. The Supreme Court of the United States has approved and found the act constitutional. This law is known as the Webb-Kenyon act and by it and under it any state has full power to fully control the use, sale, transportation and manufacture of liquors, etc., within its own limits.

The very evident intent then of the proposed prohibition amendment is to force its provisions upon those states which do not want it. It is clear that in such states at least there would be endless conflict between the federal and state authorities, under this section 2 where "concurrent power" is given.

In the Thirteenth Amendment it was declared that neither slavery nor involuntary servitude, except as punishment for crime, etc., shall exist, and by Section 2, of that amendment, it was provided that "Congress shall have power to enforce this article by appropriate legislation." The same principle was applied and adopted in the Fourteenth and Fifteenth Amendments. In each the people declared the governing idea, whether positive or negative, and in each gave to the Congress in the same language just quoted, power to enforce the article by legislation. This is the simple, direct natural and clear way to draw such a provision. Why was it not followed in this case? Obviously it was not appreciated.

In cases in reference to boundary waters between different states it has been decided that where there is a concurrent power over those waters no regulation by either is effective unless consented to by the other.

In Houston *vs.* Moore (5 Wheat., 1 and 23), the judgment of the court was delivered by Mr. Justice Washington, who said that to subject citizens "to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is, to my apprehension, something very much like oppression, if not worse. In short, I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time compatible with each other.

If they correspond in every respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other so far as they do differ. If the one imposes a certain punishment for a certain offense, the presumption is that this was deemed sufficient, and, under all the circumstances, the only proper one. If the other legislature impose a different punishment, in kind, or degree, I am at a loss to conceive how they can both exist harmoniously together."

Under the two state constitutions and the acts of Congress that admitted Oregon and Washington to the union they have "concurrent power" over the Columbia River. Both states passed laws by which they regulated the taking of salmon in the river. A man was convicted of violating a statute of Oregon, which differed from the statute of Washington in its provisions and in the punishment for its violation. In discharging the prisoner, the court said: "It is the act of concurrence between the two states in the exercise of legislative authority that validates the act and gives it the force of law, and unless there is a concurrence or assent by both states to the enactment, it cannot have that force."[2]

The section of the proposed prohibition amendment under consideration was introduced into the Senate at the very close of the debate on the principal question and it does not appear by the Congressional Record that there was any discussion upon it. It is evident that there was very little consideration paid to it.

Ex-United States Senator Sutherland, whose term expired March 4, 1917, said on this point:

> I happened to be a member of the Senate when the first draft of this proposed amendment was presented, and it was considered before the Judiciary Committee of the Senate, and at that time some of us called attention to the very objection that I am now calling attention to, and this objectionable language was stricken out, and the proposition was reported with a single provision that Congress should have power to enforce it. No vote was taken upon the proposition at that session. At the next session it was reintroduced, and it went through without any questions being raised about it by anybody and apparently without attention being called to it. This to my mind is so serious that I think lawyers who have any respect for a fundamental thing ought to put themselves on record as being against it.

IV

The seven year allowance for ratification, provided for in section 3 of the amendment, has been severely criticized, but discussion of this feature of the amendment is unnecessary except to call attention to the fact that the time within which the

[2] Ex. Parte Desjeiro, 152 Fed. 1004 (1907).

amendment may be ratified by the states does not expire until the year 1924. There is, therefore, abundant time for the states to give the matter most careful consideration.

IN CONCLUSION

The method to be pursued by Congress in proposing an amendment to the Constitution is a mandatory, not a permissive one. Amendments to the organic law should not be submitted for adoption until that mandate has been complied with. Two thirds of both houses must deem it necessary and when that time arrives it is the duty of the Congress to submit proposed amendments and not before.

Outside of the amendments proposed by the first Congress no amendments to the federal Constitution were found necessary until after the close of the Civil War. Three amendments were then proposed and ratified. No further attempts were made until 1909 when the income tax amendment was adopted and then in 1913 came the amendment with regard to the election of the United States Senators by the people. Now in 1918 another amendment is before us for ratification. The tendency is dangerous. Where will the end be? A proper regard for the perpetuation of the union forbids a ratification of all unnecessary amendments and especially forbids a ratification of those not properly submitted.

On account first of its dangerous tendency; second, for the reason that it has never received a proper vote of Congress; third, because it gives rise to conflicting legislation, and finally, because it is inherently wrong as a part of the federal Constitution, the proposed amendment ought not to be ratified by the states.

THE RECENT WEBB-KENYON DECISION

Since this address was made the Supreme Court of the United States, in a case arising from Kansas, has decided that the Webb-Kenyon law which had previously been held to be constitutional was not affected by the fact that, on the vote in congress following the presidential veto, less than two thirds of the entire membership of both house and senate had passed the act over the veto.

In its consideration of the case the Supreme Court holds that the context of Article I., Section 7, Clause 2, leaves no

doubt that the provision was dealing with the two houses as organized, and entitled to exert legislative powers.

The court then goes on to a discussion of the practice, which has prevailed in congress and which was alluded to in the address, to the effect that two thirds of both houses means two thirds of the members present, and bases its reasoning on the fact that the practice has been continued since the adoption of the first ten amendments to the Constitution up to the present time.

While the observations of the court in respect to the method of constitutional amendments are very largely, if not wholly, outside of the real subject for decision, it is very apparent from a careful reading of the opinion that its reasoning is not principally based upon any construction of Article V. of the Constitution, which that article itself would justify, but is mainly based on the fact of the congressional practice already alluded to.

Such a practice, followed by the ratification of the amendments, which have already been ratified in the past, and acquiescence therein, would constitute a waiver of any right on the part of any one now to claim that those amendments were not a part of the Constitution. So long an acquiescence would prevent such a claim.

There was substantially no question made about the advantage and necessity of each one of the amendments so far adopted, and no question was made at the time that they were not properly passed by congress.

We know that legislators, sometimes illustrious ones, do not always comply exactly with requirements and rules in dealing with subjects on which there is no disagreement and when the point of the violation of the requirement is not raised. But such action does not ordinarily establish an acquiescence or a waiver of the right of a party, be he a State or an individual, thereafter to stand on its or his rights in respect to a matter about which there is a disagreement, and where the objection is seasonably made.

It would be a very unfortunate situation if, as the speakers of the house and presidents of the senate have ruled, a senate and a house can propose constitutional amendments when a quorum has vanished from both chambers and the absence of a quorum is not suggested and the vote is passed by two thirds of those present; a situation justified by the opinion in question.

There is a vast difference between Article I., Section 7, relating to the two thirds vote required to pass a measure over the presidential veto and Article V. which relates to the amending of the Constitution.

In the former, Article I., the matter of a quorum is mentioned in Section 5, where it is stated that a majority of each house shall constitute a quorum to do business. Of course the presidential veto has to do only with the ordinary business of congress, where only a quorum is necessary and considerably less than a quorum frequently does do business when the absence of a quorum has not been suggested.

On the other hand, Article V. deals with an extraordinary matter, as is shown by the decision in the case of Hollingsworth *vs.* Virginia, 3 Dallas, 378, referred to in the address, and where the Constitution expressly provides that "the Congress, when two thirds of both houses shall deem it necessary, shall propose amendments," etc.

The decision in the Kansas case is limited to the number required to override a veto and is not conclusive of the construction to be given to the article relating to amendments, although in its opinion the court refers to that subject. Its decision as to the veto provision has a sound foundation without any reference to the amendment provision.

The opinion of the Supreme Court in connection with the Kansas case applies only to that part of the address which relates to the second point and does not in any way affect the fundamental objection to the proposed amendment in question, to wit: that it is not germane to the Federal Constitution and has nothing to do with the principles underlying our form of government, but is merely a police regulation and one of many, which might as well claim a place in that document.

The opinion of the Supreme Court also has no bearing upon that part of the address which relates to the objectionable feature contained in the proposed amendment, that the congress *and* the states shall have concurrent power to legislate, which is dealt with under part III. of the address.

THE REFERENDUM

At the present time two of the forty-eight states have refused to ratify the proposed amendment. Two others have not yet taken any action thereon. Thirty others have taken final legislative action ratifying the amendment. The remaining fourteen have taken preliminary action but the final legislative act is deferred until a referendum, provided for in their respective state constitutions, has been had.

The framers of the Federal Constitution, when it was passed in 1787, may not have had in mind the legislative referendum, which now exists in those fourteen states but the Constitution

clearly intended that any proposed amendment must be legally ratified by the legislative action of three quarters of the states. It did not contemplate that any illegal or partial action on the part of the legislatures of the states would be sufficient.

Now it is perfectly competent for a state in its constitution to decrease or increase the number of its members or the number of its houses, either as they existed at the time the Federal Constitution was adopted or at any other time. It is entirely proper for a state to increase its house of representatives, for instance, to five hundred or a thousand, or even more, members if it sees fit. The effect of the referendum is a modification of the legislature as it previously existed. It practically increases the number of members of the legislature so far as the subject matter of the particular referendum is concerned, to the entire electorate of the state in question, and before any valid legislative action can be taken, in cases where the procedure is followed, a referendum must be had.

Of course no state, in its own constitution or laws, can change the Federal Constitution, but the action of a state in ratifying or not ratifying a proposed Federal amendment is a state action and the state has power to modify its legislative authority in any legal way and the referendum when properly sought is a legal modification of the legislative power. Until that has been had the legislative action of the state is not completed. The situation, in some respects, resembles the case where one branch of the legislature ratifies the proposed Federal amendment and the other branch does not act at all. There is thus incompleted action.

These subjects are new and have not yet been decided by our courts but because of their importance they merit the most serious consideration.

February 11, 1919

THE ECONOMIES OF SAFETY

By LEW R. PALMER

DIRECTOR SAFETY AND PERSONAL EQUITABLE LIFE ASSURANCE SOCIETY

IN order that I may direct my ammunition against the properly restricted sector of this elaborate program, I have consulted the usual authority, and am advised that "economy" comes from the Greek (*οἰκονομία*) "and implies management." We infer that the author means *good* management.

Safety, as treated in this paper, will deal with that vital